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No. 71-924

In the Supreme Court of the United States

OCTOBER TERM, 1971

SEARS, ROEBUCK AND CO., ET AL., PETITIONERS

v.

JOSEPH H. SOLIEN, REGIONAL DIRECTOR OF THE FOURTEENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not yet officially reported. The order of the district court dismissing the complaint is set forth at Pet. App. 7a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on November 3, 1971. The petition for a writ of certiorari was filed on January 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the district court properly dismissed a suit to enjoin the Board's regional director from negotiating a settlement of an unfair labor practice case where the party objecting to the settlement failed to exhaust its remedies before the Board and the court of appeals.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the Administrative Procedure Act (80 Stat. 381, 5 U.S.C. 701, *et seq.*), and the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth at Pet. App. 15a-21a.

STATEMENT

This case (*"Solien III"*) is the third of four cases which have grown out of an effort by respondent Solien, the Board's Regional Director, to negotiate a settlement of unfair labor practice charges over the objections of the charging parties, Sears, Roebuck and Company ("Sears"), and Terminal Freight Cooperative Association and Terminal Freight Handling Company ("Terminal"). The relevant facts may be sum-

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[1] The other cases, which will be discussed *infra*, are: *Solien* v. *Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F. 2d 124 (C.A. 8), certiorari denied, 403 U.S. 905 (*"Solien I"*); *Terminal Freight Handling Co.* v. *Solien*, 444 F. 2d 699 (C.A. 8), petition for certiorari pending, No. 71-609 (*"Solien II"*); and *Terminal Freight Handling Co.* v. *Solien*, No. 71-1650 (C.A. 8), decided December 17, 1971, petition for certiorari pending, No. 71-925 (*"Solien IV"*).

marized as follows:

In June 1970, Terminal and Sears filed unfair labor practice charges with the Regional Director alleging that Drivers Union Local 610 ("the Union") was engaging in secondary boycott activity in violation of Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B)) (A. 11-21).[2] The Regional Director, finding reasonable cause to believe that the charges were true, issued a complaint based thereon (A. 31-39), and, pending a final determination by the Board, petitioned the district court, pursuant to Section 10(*l*) of the Act (29 U.S.C. 160(*l*)), for temporary injunctive relief (A. 3-10).[3] Terminal and Sears moved to intervene in the 10(*l*) proceeding as full parties. The Regional Director opposed their motion on the ground that the Act limits the charging party to the right "to appear by counsel and present any relevant testimony" (29 U.S.C. 160(*l*)).

Thereafter, the Regional Director and the Union entered into a stipulation providing for a cessation of the Union's alleged unlawful conduct pending a final adjudication of the charges by the Board, and for the entry of a temporary injunction if the stipulation were violated. (Pet. App. in No. 71-925, pp. 15-20.)

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[2] "A." refers to the appendix to the briefs in the court below.

[3] When the Regional Director deferred seeking a 10(*l*) injunction pending the completion of informal settlement negotiations with the Union, Terminal and Sears instituted suit in the district court (*Solien II*, n. 1, *supra*) to compel the Regional Director to petition for such injunctive relief. See Brief for the Respondent in Opposition, pp. 2-6, *Terminal Freight Handling Co.* v. *Solien*, No. 71-609.

Terminal and Sears filed objections to the stipulation on the ground, *inter alia*, that it should have empowered them to apply for an injunction independently of the Regional Director in the event of a violation. (Pet. App. in No. 71-925, pp. 20-25). The district court denied the motions to accord Terminal and Sears full party status, but required that certain modifications be made in the stipulation; it approved the revised stipulation on July 9, 1970 (Pet. App. in No. 71-925, pp. 26-42). The approved stipulation provided for the entry of a temporary injunction by the court upon the filing of an affidavit by the Regional Director that he had found probable cause to believe that the stipulation was being violated (Pet. App. in No. 71-925, pp. 41-42).[4]

The Union then entered into negotiations with the Regional Director in an effort to settle the unfair labor practice case. In relevant part, the Board's rules provide the following settlement procedures:

After the issuance of a complaint, the agency favors a formal settlement under which "the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the

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[4] Terminal and Sears appealed from the district court's order denying them full party status in the 10(*l*) proceeding, the court of appeals affirmed the order, and this Court denied certiorari (*Solien I*, n. 1, *supra*). On September 13, 1971, after the denial of certiorari in *Solien I*, Terminal filed a motion with the district court to set aside or amend the stipulation which it had approved some 14 months earlier. The district court denied the motion, the court of appeals summarily affirmed the district court, and this is the subject of the petition in No. 71-925 (*Solien IV*, n. 1, *supra*).

respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order." 29 C.F.R. 101.9(b)(1) (Pet. App. 19a).

If the charging party does not join in the proposed settlement, he may file his objections with the regional director. If the regional director approves the settlement notwithstanding the objections of the charging party, he must provide a "brief written statement of the reasons for the approval." 29 C.F.R. 101.9(c)(1) (Pet. App. 20a). If the settlement agreement provides for the entry of a Board order, the agreement "together with the charging party's objections and the regional director's written statements," are submitted to the Board's General Counsel for review. If the General Counsel approves the settlement, he must inform the charging party and submit the agreement together with the charging party's objections and the statement of the General Counsel's reasons in support of the settlement to the Board for approval. "Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board * * * a further statement in support of his objections to the settlement agreement." 29 C.F.R. 101.9(c)(2) (Pet. App. 20a). If the Board ultimately issues an order approving the settlement agreement, the charging party may obtain review of that order in the court of appeals under Section 10(f) of the Act (29 U.S.C. 160(f); Pet. App. 16a-17a).

Instead of following this procedure, Terminal and Sears demanded at the outset that the Regional Director make available to them all evidence relating to the unfair labor practice charges, including the affidavits of prospective Board witnesses, and also permit them to participate in all settlement discussions which might take place with the Union. The Regional Director declined this request on the ground that it was contrary to customary Board procedure, and would impair the integrity of the Board's investigative processes. (Pet. App. 8a-14a.)

Thereupon, Terminal and Sears instituted the present suit *(Solien III)* to enjoin the Regional Director from engaging in settlement negotiations or from approving any settlement agreement, without their full participation including disclosing to them the evidence in the Board's files relating to the alleged unlawful conduct of the Union (A. 84-90). The district court granted the Board's motion to dismiss the suit for lack of jurisdiction over the subject matter (Pet. App. 7a). The court of appeals affirmed, concluding that (Pet. App. 5a):

> * * * we cannot say that the conduct complained of is clearly in excess of the Regional Director's power. Since a determination of this issue is dependent upon a construction of the rules adopted by the Board, the Board itself is the proper forum to first pass on this matter. Furthermore, it is clear that appellants have not exhausted their available administrative remedies. A mere assertion of illegality of a practice of the Regional Director when full Board and appellate review is available is insufficient to grant the district

court subject matter jurisdiction in the face of the well established doctrine of exhaustion of administrative remedies.[5]

ARGUMENT

Petitioners contend that the settlement agreement approved by the Regional Director does not provide an adequate remedy for the unfair labor practices charged, and that the procedure followed by the Regional Director did not afford them an adequate opportunity to participate and to present their views. Under the Board's rules, however, the settlement is not final until it has been approved by the Board; before this occurs, petitioners will have an opportunity to present their objections, first to the General Counsel[6] and then to the Board itself. If the Board ultimately approves the settlement, it will be embodied in a Board decision and order which petitioners can then challenge in the court of appeals. See *Textile*

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[5] Meanwhile, on July 24, 1970, the Union agreed to enter into a formal settlement of the unfair labor practice case, whereby it waived its right to file an answer to the complaint and to a hearing, and consented to the entry of an order by both the Board and the court of appeals enjoining it from engaging in the unlawful activity alleged in the unfair labor practice complaint (Pet. App. in No. 71-925, pp. 69-80). The Regional Director, after considering the objections of Terminal and Sears, recommended that the settlement be approved by the General Counsel and the Board (*id. ut* pp. 81-96). The matter is presently before the General Counsel, who has agreed to reconsider the prior action of his office approving the settlement (Pet. in No. 71-924, p. 5, n. 5).

[6] The General Counsel has agreed to reconsider his prior approval of the settlement (n. 5, *supra*).

Workers of America v. *National Labor Relations Board (Roselle Shoe Corp.)*, 294 F. 2d 738 (C.A. D.C.); *Local 285, International Bro. of Teamsters* v. *National Labor Relations Board (J. J. White Co.)*, 339 F. 2d 795 (C.A. 2).

In sum, petitioners will have a full opportunity to present their objections to the settlement itself and to the manner in which it was negotiated during the subsequent administrative and judicial stages of the proceeding. The court of appeals thus correctly concluded that petitioners' attempt to circumvent this procedure by an equity suit in the district court was contrary to settled principles requiring exhaustion of administrative and statutory review procedures. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752.

Petitioners contend (Pet. 6-9) that, to permit the Board and ultimately the court of appeals to review their objections to the settlement agreement, would impair the final authority which Section 3(d) of the Act (Pet. App. 15a) confers upon the General Counsel "in respect of the investigation of charges and issuance of complaints * * * and * * * the prosecution of such complaints before the Board." The General Counsel has broad discretion to determine whether a complaint should issue on a charge, and, if one has issued, whether to proceed to hearing or to accept a settlement. When he finally decides to accept a settlement calling for a Board order, however, he has exercised his "prosecutorial discretion". Neither the Board nor the court of appeals impinges upon that discretion in subsequently adjudicating any objections

which the charging party may have to the adequacy of the settlement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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